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IN THE

Supreme Court of the United States

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October Term, 1939.

No. 462.

GERMANTOWN TRUST COMPANY, Trustee of the
Germantown Trust Company Bond Investment Fund,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit and Brief in
Support Thereof.

SHIPPEN LEWIS,
HAROLD EVANS,

Philadelphia, Pa.,

PAUL F. MYERS,

Washington, D. C.,

Counsel for Petitioner.

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IN THE
Supreme Court of the United States.

No. October Term, 1939.

**GERMANTOWN TRUST COMPANY, TRUSTEE OF THE
GERMANTOWN TRUST COMPANY BOND INVESTMENT
FUND,**

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Germantown Trust Company, Trustee of the Germantown Trust Company Bond Investment Fund respectfully prays that a writ of certiorari be granted to remeve into your Honorable Court for review an order of the Circuit Court of Appeals for the Third Circuit entered July 14, 1939, reversing a decree of the United States Board of Tax Appeals in favor of the petitioner above named.

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.**(a) The Decrees Below.**

Respondent, the Commissioner of Internal Revenue, determined a deficiency in petitioner's federal income tax for 1932, claiming petitioner was an association taxable as a corporation instead of as a trust. Petitioner filed a petition with the United States Board of Tax Appeals for a redetermination of the deficiency, asserting (1) it was taxable as a trust and not as an association, and (2) the two year statute of limitations from the time the "return" was filed had run against the assessment and collection of the deficiency under Section 275(a) of the Revenue Act of 1932. The Board of Tax Appeals, as set forth in its memorandum opinion entered August 24, 1938, ordered and decided there was no deficiency, for this statute applied and the limitation had run. As this disposed of the case, the Board did not discuss or decide the other issue. The Commissioner appealed to the Circuit Court of Appeals for the Third Circuit and to the Circuit Court of Appeals for the District of Columbia. The case first came before the Third Circuit Court, which decided it had jurisdiction under Section 1002(a) of the Revenue Act of 1926, as amended (26 U. S. C. A. 641), and, reversing the Board's decision on the statute of limitations, held that the four year limitation under Section 275(c) of the Revenue Act of 1932 applied rather than the two year limitation under Section 275(a) and remanded the record to the Board, directing it to determine the petitioner's appeal on the merits.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the Commissioner's appeal from the decree of the Board of Tax Appeals and the questions for review before this Court are:

- (1) Whether venue to review the decision of the Board of Tax Appeals was in the Third Circuit Court or in the Circuit Court of Appeals for the District of Columbia; that is, was the fiduciary return of income on treasury form 1041 "the return of the tax in respect of which the liability arises" or "no return" under Section 1002(a) of the Revenue Act of 1926, as amended.
- (2) Whether the "fiduciary return of income" on Treasury Form 1041 was "the return" specified in Section 275(a) of the Revenue Act of 1932 so that the assessment and collection of the proposed tax deficiency was barred.
- (3) Whether a "fiduciary return of income" on Treasury Form 1041 can be a "return" that decides the venue on the appeal under Section 1002(a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275(a) of the Revenue Act of 1932. Does the word "return" have a different meaning in these two Sections?

(c) The Statutes Involved.

The question of venue to review the decision of the Board of Tax Appeals involves Section 1002(a) of the Revenue Act of 1926, c. 27, 44 Stat. 110, as amended by Section 519, Act of 1934, c. 27, 48 Stat. 760 (26 U. S. C. A. 641).

The power of the Commissioner to assess a deficiency in petitioner's 1932 federal income tax involves Section 275(a), and 275(c) of the Revenue Act of 1932, c. 209, 47 Stat. 237.

Summary Statement of Matter Involved

These statutes are set forth in the appendix to the brief at pages 1a-3a.

(d) Statement of Facts.

The Germantown Trust Company, by agreement dated April 1, 1930 (R. 36), formed The Germantown Trust Company Bond Investment Fund, and has since operated it according to the terms of the agreement (R. 31).

The Company, as trustee, filed for the Fund "Fiduciary Returns of Income" on Treasury Form 1041 (furnished for use by trustees) for the years 1930 and 1931. The Commissioner accepted these returns, and the Fund was taxed for these years as a trust, and not as a corporation.

On March 15, 1933, the Company, as trustee, filed for the Fund a "Fiduciary Return of Income" on Treasury Form 1041 for the calendar year 1932 with the Collector of Internal Revenue of the First District of Pennsylvania at Philadelphia (R. 35, 53a-53b). The petitioner did not file a "Corporation Income Tax Return" on Treasury Form 1120 for this year (R. 35). On September 17, 1936 the respondent prepared a so-called "Substitute Return" for the petitioner on Treasury Form 1120 for 1932 (R. 35, 53c).

The individual participants in the Fund who were required to make federal individual income tax returns for 1932 for the amounts of the distributed or distributable income of the petitioner for the year 1932 included in their respective returns, filed on or before March 15, 1933, their shares of the income disclosed on the schedule attached to the fiduciary return of income (R. 35, 36). The Commissioner on February 27, 1937 mailed a notice of a deficiency to petitioner claiming that petitioner was an association taxable as a corporation instead of a trust, for the year 1932 (R. 8, 36). This notice was mailed to the petitioner more

than two years after the return on Form 1041 was filed by the petitioner as trustee, but less than four years after March 15, 1933, the last date on which any participant in the Fund filed his 1932 individual return for the purposes of this case (R. 35; 36). The first notice petitioner had of the Commissioner's new position was the recommendation on or about July 8, 1936 of an internal revenue agent that the Fund be taxed as a corporation (R. 36).

A petition for a redetermination of this deficiency was filed with the Board of Tax Appeals on May 22, 1937 (R. 4-7). The decrees of the Board and of the court below have been outlined above in (a) The Decrees Below, and for the sake of brevity are not repeated.

II. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals a review of which is sought is in conflict with the decision rendered by the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner v. Roosevelt and Son Investment Fund*, 89 Fed. (2d) 706 (1937), which involved the same questions of law.

(2) The question whether venue to review a decision of the Board of Tax Appeals is in the Circuit Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the circuit in which is located the office of the Collector of Internal Revenue with which was filed a "Fiduciary Return of Income" under Section 1002(a) of the 1926 Revenue Act as amended involves an important question of federal law which has not been, but should be, settled by this Court.

(3) The question whether a "Fiduciary Return of Income" on Treasury Form 1041 can be the "return" that decides the venue on the appeal under Section 1002(a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275(a) of the Revenue Act of 1932, that is, does the word "return" have a different meaning in these two Sections, involves an important question of federal law which has not been, but should be, settled by this Court.

Wherefore your petitioner prays that this petition be granted and that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review the questions hereinabove stated.

GERMANTOWN TRUST COMPANY
TRUSTEE OF THE GERMANTOWN TRUST
COMPANY BOND INVESTMENT FUND.

By C. S. SMYTH,
Vice-President.

SHIPPEN LEWIS,
HAROLD EVANS,
Philadelphia, Pa.
PAUL F. MYERS,
Washington, D. C.,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

No. October Term, 1939.

*Germantown Trust Company, Trustee of the Germantown
Trust Company Bond Investment Fund,*

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.

A. OPINIONS OF THE COURTS BELOW.

The memorandum opinion of the Board of Tax Appeals is printed in the Record, pp. 16 to 17, inclusive. It is not reported in the official reports of the Board.

The opinion of the Circuit Court of Appeals is printed in the Record at pp. 48 to 53, inclusive, and has been reported in 106 Federal Reporter (2d Series) 139.

B. JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on July 14, 1939 (R. 53).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. 347), as amended by the Act of February 13, 1925, 43 Stat. 938.

C. CONCISE STATEMENT OF THE CASE.

The summary statement of the matters involved, *supra*, pages 2-5, sets forth the relevant facts material to the consideration of the questions presented on the present petition.

D. SPECIFICATIONS OF ERROR.

A specification of the errors intended to be argued has been given in the petition on page 3 under the heading "Summary Statement of the Matter Involved, (b) The Questions Presented" and in the interest of brevity it is not repeated here.

E. ARGUMENT.

1. Brief Statement of Facts.

Germantown Trust Company is a trust company organized and existing under the laws of the State of Pennsylvania. It conducts a trust business involving the handling of all forms of trust estates and also acts as agent for various individuals and corporations in the custody, handling and management of their investments. In order to afford persons of small means the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit of ready liquidation of the investments, the Company by agreement dated April 16, 1930, formed The Germantown Trust Company Bond Investment Fund (R. 29-30).

The facts in regard to the establishment and operation of this Fund were covered by stipulation before the Board of Tax Appeals (R. 29-43), and the Board adopted it as its Findings of Fact (R. 16).

The development of the case has been outlined above at "I. Summary Statement of the Matter Involved (a) The Decrees Below, (d) Statement of Facts."

2. The decision of the Circuit Court of Appeals below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit.

In *Commissioner v. Roosevelt and Son Investment Fund*, 89 Fed. (2d) 706 (1937), the Second Circuit Court decided it did not have jurisdiction to review a decision of the Board of Tax Appeals because a "Fiduciary Return of Income" on Treasury Form 1041 filed for the calendar year 1929 was not "a return of the tax in respect of which the liability arises," as required under Section 1002(a) of the Revenue Act of 1926, as amended by the Act of 1934 (26 U. S. C. A. 641). In that case the principal business of the partnership of Roosevelt and Son, which managed that Fund, was "to care for other people's money, acting as Trustee under wills and deeds of trust, and serving as custodian." On March 9, 1934, the Commissioner of Internal Revenue mailed a notice of deficiency stating that the Fund was held to be an association and taxable as a corporation. The notice, as in this case, was mailed more than two years after the return on Form 1041 was filed, but less than four years after the individual returns of the participants were filed. The Board of Tax Appeals, 34 B. T. A. 38, had decided the assessment of the deficiency was barred by the two year statute of limitations in Section 275(a) of the Revenue Act of 1928, and that Section 275(e) of that Act, c. 852, 45 Stat. 856, was not applicable. The wording of these sections is the same as Sections 275(a), 275(e) of the Revenue Act of 1932 involved in this case.

The Circuit Court of Appeals at page 708 stated:

"The petitioner (Commissioner) has invoked the jurisdiction of the court by alleging that the respondent filed a fiduciary information return for the year 1929 with the Collector of Internal Revenue for the Second District of New York and the office of the collector is located within this judicial circuit. Thus the representation is made of jurisdiction by reason of the return filed by respondent on Form 1041. But if these representations be correct, the alleged deficiency is clearly barred by the limitation provisions of Section 275a. If the petitioner concedes that a proper return was filed Section 275c of the statute becomes inapplicable for that section by its terms applies only where no return is made. The petitioner may not assume two inconsistent positions. He has invoked the court's jurisdiction with the representation that a return of tax was filed in the New York Collector's office and now argues for a reversal of the Board's decision on the ground that the alleged deficiency is not barred because no return of the tax was filed by the respondent.

"The truth is that the information return filed by the respondent was not the return of a tax at all but merely detailed the information with which the tax upon the beneficiaries could be computed. It is immaterial in this respect that such a return has been held to prevent the imposition of a penalty (*Hartford-Connecticut Trust Co. v. Bowers*, 34 Fed. 2, 138 (CCA. (2))) or that it contained all the facts by which a computation of the tax could be arrived at. Section 275c is explicit in its reference to the 'return of the tax imposed by this title.' That means just what it says and may not be extended to include an information return which in fact is no tax return at all.

"An absence of jurisdiction is a corollary to what we have just said. If there was no return within Section 275c, which pertains to the tax herein sought to be

assessed, there certainly was no 'return of the tax in respect of which the liability arises'. Consequently the prerequisite to jurisdiction prescribed by Section 1002, as amended, is not fulfilled. It cannot be that there was a return for one purpose but not for another.

"The petition is dismissed for lack of jurisdiction."

In this case the Germantown Trust Company as Trustee filed for the Fund a "Fiduciary Return of Income" on Treasury Form 1041 for the year 1932 on March 15, 1933 (R. 35, 53a-53b). It did not file a corporation income tax return on Treasury Form 1120 (R. 35). The net taxable income disclosed in the fiduciary return was included by the participants of the fund in their 1932 individual federal income tax returns, of which the last was filed March 15, 1933 (R. 35, 36). On February 27, 1937, the Commissioner of Internal Revenue mailed a notice of deficiency to the Trustee stating that the Fund was held to be an association and taxable as a corporation (R. 8, 36). The Court said:

"Was a return of tax filed in this case so as to give this court jurisdiction? We can find no basis for distinguishing between a fiduciary return and a corporation income tax return, so far as jurisdiction is concerned. Both are tax returns, though one may be accompanied by payment, and both involve a definite act on which jurisdiction may be hung. Both are returns 'of the tax in respect of which the liability arises'. If the Fund is taxable the tax is based on the information shown in the Fiduciary Return. It is spoken of as a 'return' by Sec. 142 of the Act: 'Requirement of return.—Every fiduciary . . . shall make under oath a return . . . for any of the following individuals, estates, or trusts for which he acts . . . ' The distinction becomes irrational for this purpose. It is

only when no act is performed by the taxpayer, no return of any kind made, that it becomes necessary to set up jurisdiction elsewhere." (R. 49-50.)

"We are of course familiar with the decision of the Circuit Court of Appeals for the Second Circuit in Commissioner v. Roosevelt & Son Inv. Fund, 89 F. (2d) 706, that it did not have jurisdiction, not passing on the other question, and dismissing the appeal. Similar facts were presented. The court thought that 'return of the tax' must carry the same meaning in the venue section as in the limitation sections. But courts have not felt it necessary to invoke such rigid consistency where different meanings were evidently intended for the same words. See Helvering v. British-American Tobacco Co., 69 F. (2d) 528, 530 (CCA 2d), affirmed 293 U. S. 95; Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 86-88. The context of words may affect their meanings. The kind of return required by classification for jurisdiction need not be the same as the return which will start a period of limitation."

"We decide therefore that we have jurisdiction; that section 275(c) is applicable, and that the decision of the Board of Tax Appeals must be reversed." (R. 52.)

These two cases are directly in conflict on the venue issue: whether a "Fiduciary Return of Income" on Treasury Form 1041 is a "return of the tax in respect of which the liability arises" under Section 1002(a) of the Revenue Act of 1926, as amended.

These two cases are directly in conflict upon the construction of the word "return" used in Section 1002(a), as amended, and in Section 275(a) and (c) of the Revenue Acts of 1928 and 1932.

The Second Circuit Court of Appeals held (1) that if the fiduciary return was the "return" specified in Section

1002(a), then it must also be the "return" specified in Section 275(a), and (2) that it was not a return under either Section and therefore the Court did not have jurisdiction. The Court stated,—"It can not be that there was a return for one purpose (jurisdiction) but not for another" (statute of limitations).

The Third Circuit Court of Appeals decided that the fiduciary return was not the "return" specified in Section 275(a), but that it still was the "return" specified for venue under Section 1002(a). The Court said:

"The court (Second Circuit) thought that 'return of the tax' must carry the same meaning in the venue section as in the limitation sections. But courts have not felt it necessary to invoke such rigid consistency where different meanings were evidently intended for the same words. See Helvering v. British-American Tobacco Co., 69 F. (2d) 528, 530 (CCA 2d), affirmed 293 U. S. 95; Helvering v. Stockholms Enskilda Bank, 293 U. S. 84, 86-88. The context of words may affect their meanings. The kind of return required by classification for jurisdiction need not be the same as the return which will start a period of limitation." (R. 52.)

3. The question whether venue to review a decision of the Board of Tax Appeals is in the Circuit Court of Appeals for the District of Columbia or in the Circuit Court of Appeals for the circuit in which is located the office of the Collector of Internal Revenue to which was made a "Fiduciary Return of Income," involves an important question of federal law which has not been, but should be, settled by this Court.

Since the decision of the Second Circuit Court in the case of *Commissioner v. Roosevelt & Son Investment Fund*, *supra*, petitions to review decisions of the Board of Tax Appeals filed by the Commissioner or by a taxpayer in

cases in which only "Fiduciary Returns of Income" on Treasury Form 1041 were filed have had to be taken to both the Circuit Court of Appeals of the District of Columbia and the Circuit Court of Appeals for the circuit in which was located the office of the Collector of Internal Revenue to which the "return" was made. If this were not done, and the appeal was filed only with the Circuit Court of Appeals for the circuit in which the Collector's office was located and that Court decided as the Second Circuit Court did, that it did not have jurisdiction to review the Board's decision as no "return" had been filed, the appellant's right to appeal to the Circuit Court of Appeals for the District of Columbia was lost as the three months period within which to file the petition would ordinarily have expired. The converse of this situation would also be true if an appeal had been filed only with the Circuit Court of Appeals for the District of Columbia. The appellant had thus lost his remedy, and had no redress by appeal.

4. The question whether a "Fiduciary Return of Income" on Treasury Form 1041 can be the "return" that decides the venue on the appeal under Section 1002(a) of the Revenue Act of 1926 as amended, and not be the "return" that starts the running of the period of limitations under Section 275(a) of the Revenue Act of 1932, that is, does the word "return" have a different meaning in these two Sections, involves an important question of federal law which has not been, but should be, settled by this Court.

Organizations that had considered themselves to be and had been considered by the Commissioner to be trusts filed "Fiduciary Returns of Income" on Treasury Form 1041 and did not file corporation income tax returns on Form 1120. See *Commissioner v. Roosevelt & Son Investment Fund*, *supra*; *Lee H. Marshall Heirs*, 39 B. T. A. 101. The

Commissioner took the position that certain of these entities should be taxed as associations instead of as trusts.

This Court in 1935 in the cases of *Morrissey v. Commissioner*, 296 U. S. 344, *Swanson v. Commissioner*, 296 U. S. 362, *Helvering v. Combs*, 296 U. S. 365, and *Helvering v. Coleman-Gilbert Associates*, 296 U. S. 369, established certain principles by which to determine whether an entity is a trust or an association for income tax purposes.

The provisions in Sections 275(a) and 275(c) of the Revenue Act of 1932 were first included in the revenue statutes as Sections 277(a) (1) and 277(a) (5) respectively of the Revenue Act of 1926, c. 27, 44 Stat. 58. The original wording of Section 277(a) (5) has been retained in the corresponding Sections in all the subsequent revenue acts. The original wording of Section 277(a) (1) has been retained in the corresponding Sections in all the subsequent revenue acts except that the time of the period of limitations has varied. This does not, however, affect the construction of the word "return."

The construction of these Sections and the intention of Congress in enacting them has never been presented to this Court.

The petitioner asks this Court to issue its writ of certiorari to the Circuit Court of Appeals, and after a review of the case to reverse the decree of that Court and to affirm the decision of the Board of Tax Appeals.

Respectfully submitted,

SHIPPEN LEWIS,

HAROLD EVANS,

Philadelphia, Pa.

PAUL F. MYERS,

Washington, D. C.,

Counsel for Petitioner.

APPENDIX.

VENUE.

Revenue Act of 1934; c. 277, 48 Stat. 760:

Sec. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

"(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

(c) Section 1002 of the Revenue Act of 1926, as amended by this section, shall be applicable to all decisions of the Board rendered on or after the date of the enactment of this Act, and such section, as in force prior to its amendment by this section, shall be applicable to such decisions rendered prior thereto, except that subdivision (b) thereof may be applied to any such decision rendered prior thereto (U. S. C., Title 26, Sec. 641).

(1a)

STATUTE OF LIMITATIONS

Revenue Act of 1932, c. 209, 47 Stat. 237, Sec. 275(a);
Revenue Act of 1928, c. 852, 45 Stat. 856, Sec. 275(a):

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) **GENERAL RULE.**—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1932, c. 209, 47 Stat. 237, Sec. 275(c);
Revenue Act of 1928, c. 852, 45 Stat. 856, Sec. 275(c);
Revenue Act of 1926, c. 27, 44 Stat. 58, Sec. 277(a) (5):

(c) **CORPORATION AND SHAREHOLDER.**—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 142:

SECTION 142. FIDUCIARY RETURNS.

(a) **Requirement of return.**—Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof

and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of \$1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$2,500 or over, if married and living with husband or wife;

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income;

(4) Every estate or trust the net income of which for the taxable year is \$1,000 or over;

(5) Every estate or trust the gross income of which for the taxable year is \$5,000 or over, regardless of the amount of the net income; and

(6) Every estate or trust of which any beneficiary is a non-resident alien.

Revenue Act of 1926, c. 27, 44 Stat. 58:

Sec. 277. (a) (1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.